No. 91-952

SUPREME COURT, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

ACTION FOR CHILDREN'S TELEVISION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

JOHN G. ROBERTS, JR.
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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In *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), this Court held that the FCC could constitutionally apply the longstanding statutory prohibition on indecent broadcasting, 18 U.S.C. 1464, to a daytime broadcast of patently offensive, albeit non-obscene, material. In reaching that conclusion, the Court identified two compelling interests that support restrictions on indecent broadcasting. First, because "the broadcast media have established a uniquely pervasive presence in the lives of all Americans," "[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone

plainly outweighs the First Amendment rights of an intruder." 438 U.S. at 748. Second, "broadcasting is uniquely accessible to children, even those too young to read." *Id.* at 749. "The ease with which children may obtain access to broadcast material," coupled with the "government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household,' " "amply justify special treatment of indecent broadcasting." *Id.* at 749-750. See also *id.* at 756-761 (Powell, J., concurring in part and concurring in the judgment).

The fundamental question in this case is whether, in light of evidence that millions of children are present in the audiences for television and radio at all times of the day and night, those same two interests will support an Act of Congress providing for 24-hour-per-day enforcement of Section 1464. Because the court of appeals deemed itself bound by a prior decision addressing a different enforcement approach, it did not even give plenary consideration to the interests this Court recognized in *Pacifica*. Only this Court is now in a position to undertake that task. Since the court of appeals' judgment precludes any future enforcement of the congressionally mandated prohibition on indecent speech, no other lower court will have the opportunity to consider that statute's constitutionality.

The fact that the court of appeals struck down a federal statute, the importance and finality of that decision, and the absence of any meaningful attention to governing legal standards in the decision below present a compelling case for this Court's review. None of the objections that respondents advance suggests otherwise.

1. Contrary to respondents' contention,[1] the court of appeals' decision is plainly ripe for this Court's review. Although the court remanded to the Commission for further proceedings, the court's mandate precludes any further consideration of the merits of Congress's 24-hour prohibition on indecent speech. The remand is limited to the issue of "the times at which indecent material may be broadcast" and other matters bearing on that issue. Pet. App. 12a; see *id.* at 32a-38a.

Furthermore, the FCC has completed a comprehensive study of the justifications for 24-hour enforcement of Section 1464. Pet. App. 82a-191a. Contrary to respondents' suggestion (ACT Opp. 19), the Commission has already assembled "a fully-developed * * * record" that addresses "available alternatives to a complete ban on protected speech and the effectiveness of such alternative measures in serving the valid governmental interest." The limited proceedings contemplated by the court of appeals' remand would contribute nothing to this Court's consideration of the question presented by the petition.

2. Respondents' defense of the merits of the court of appeals' decision has two principal themes. The invalidity of both underscores the absence of any justification for the court of appeals' decision and the need for this Court's review.[2]

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[1] Brief for the Respondents Action for Children's Television, *et al.*, in Opposition 12, 18-19 [hereinafter ACT Opp.]; Brief for the Respondents Pacifica Foundation, Pen American Center, Allen Ginsberg, *et al.*, in Opposition to Petitions for Writs of Certiorari 15 n.10 [hereinafter Pacifica Opp.].

[2] In their zeal to discredit the FCC's approach to indecent broadcasting, respondents leave the impression that the Commission has enforced Section 1464 against "news, informational programs, political advertising, presentations of serious drama, motion pictures, dramatizations of serious works of literature, satirical material, and recordings by popular musicians." ACT Opp.

a. First, respondents attempt to rework decisions involving a variety of media into a general principle that "blanket bans on speech, whether involving print, cable, telephone, or broadcast, violate the First Amendment." ACT Opp. 14 & n.30. In the same vein, they suggest that this Court's oft-repeated observation that measures intended for the protection of minors may "not by any means reduce adults to hearing only what is fit for children" means that space must be reserved for indecent speech in each particular medium. *Id.* at 14-16; see Pacifica Opp. 20, 21-22. The cases support neither proposition.

The decision in the instant case is the first to consider a 24-hour prohibition on indecent *broadcasting*. Other media do not share the " 'unique' attributes of broadcasting"[3] that were decisive in *Pacifica*, and cases addressing those media have repeatedly recognized that fact. With respect to the print medium, unwilling adults may simply avoid indecent published materials,

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4 & nn.6-13; see Pacifica Opp. 9 & n.5, 19. The grudging acknowledgment that the Commission *declined to take action* in all but a few of those cases is buried in a footnote. ACT Opp. 4 n.13. Moreover, respondents' carefully sanitized characterizations of the material in question provide no basis for a fair evaluation of the FCC's enforcement record. This case is not about news, informational programs, and the like; the materials that actually gave rise to the current controversy can be found in the appendix to the petition, Pet. App. 66a-69a. The record reflects that the FCC does not regard the mere presence of a sexually explicit reference in a serious presentation of a literary work or a bona fide news program as a basis for a violation of Section 1464. The material must be patently offensive. Finally, since none of the respondents filed a cross-petition seeking further review of the Commission's generic definition of indecency, their complaints concerning the scope of that definition are not properly before the Court.

[3] *Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115, 127 (1989).

and the State has the option of banning sales to minors.[4] Federal law requires cable television operators to honor requests from subscribers for lockboxes that restrict access to indecent programming, and subscribers may choose not to purchase channels providing that type of material.[5] As this Court noted in *Sable*, 492 U.S. at 127, 128, "private commercial telephone communications * * * are substantially different from the public radio broadcast at issue in *Pacifica*," since "[p]lacing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message."[6] Likewise, in *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983), this Court noted that the "receipt of mail is far less intrusive and uncontrollable" than broadcasting.

Similarly, no decision of this Court recognizes a general rule that space must be reserved in each medium for indecent speech. In *Pacifica*, the Court had no occasion to consider the constitutionality of a 24-hour ban. In fact, *Pacifica* made clear that courts are not

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[4] See *Ginsberg* v. *New York*, 390 U.S. 629 (1968).

[5] 47 U.S.C. 544(d)(2)(A). See *Cruz* v. *Ferre*, 755 F.2d 1415, 1420-1421 (11th Cir. 1985) (distinguishing *Pacifica* on this basis); *Community Television of Utah, Inc.* v. *Wilkinson*, 611 F. Supp. 1099, 1109-1110 (D. Utah 1985) ("fundamental differences between the broadcast medium and cable television require that *Pacifica* not be extended to cable television"), aff'd, 800 F.2d 989 (10th Cir. 1986), aff'd mem., 480 U.S. 926 (1987).

[6] It is for that reason that we did not rely on the interest in protecting the privacy of the home when we opposed certiorari in *Dial Information Services Corp.* v. *Barr*, cert. denied, No. 91-697 (Jan. 27, 1992). There is no merit whatever to respondents' suggestion (ACT Opp. 12 n.29) that we acknowledged the correctness of their approach in this case in our brief in opposition in *Dial Information*. Both *Pacifica*, 438 U.S. at 748-749, and *Sable*, 492 U.S. at 127, noted that the " 'unique' attributes of broadcasting" warrant a different First Amendment analysis in the context of that medium.

required to analyze the validity of restrictions on indecent broadcasting as though that medium were the only source of indecent material.[7] Other decisions on which respondents rely have carefully reserved the question whether their reasoning would reach broadcasting. *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. at 74; *Sable*, 492 U.S. at 127-128.

The governing principle that can be gleaned from all of these cases is that the First Amendment must be applied with careful attention to both the interests supporting limitations on indecent speech and the characteristics of the particular medium in question. As we demonstrated in the petition, the court of appeals failed to honor that principle in this case.

b. Respondents acknowledge, as they must, that indecent broadcasting may be restricted in order to serve "the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household'" (*Pacifica*, 438 U.S. at 749). But they advocate a cramped and artificial conception of that interest. In their view, government's legitimate interest in the Nation's youth is limited to "provid[ing] parents the opportunity to supervise their children's listening and viewing," and it is fully vindicated when

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[7] The Court stated (438 U.S. at 750 n.28):

> The Commission's action does not by any means reduce adults to hearing only what is fit for children. * * * Adults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear these words. In fact, the Commission has not unequivocally closed even broadcasting to speech of this sort; whether broadcast audiences in the late evening contain so few children that playing this monologue would be permissible is an issue neither the Commission nor this Court has decided.

At a minimum, this passage makes clear that the availability of indecent material to willing adults need not be approached on a medium-by-medium basis.

parents "are *available* to supervise their children's viewing and listening." ACT Opp. 17, 18 (emphasis added); see Pacifica Opp. 22-23.

That view of the law cannot be reconciled with *Sable*. Parents have at least the same opportunity to supervise their children's access to indecent commercial telephone messages as to indecent broadcasting. (In truth, portable radios and earphones, VCRs, and the absence of billed charges for broadcasting make it far more difficult for even the most diligent parent to limit a child's access to indecent broadcasting.) Yet *Sable* establishes that the mere opportunity to exert close supervision over children's use of telephones does not exhaust the compelling interest in protecting children from indecent speech. The Court's decision in that case was contingent upon the existence of a more effective technological means of denying access (492 U.S. at 130-131 (emphasis added)):

> For all we know from this record, the FCC's technological approach to restricting dial-a-porn messages to adults who seek them would be extremely effective, and only a few of the most enterprising and disobedient young people would manage to secure access to such messages. *If this is the case*, it seems to us that § 223(b) is not a narrowly tailored effort to serve the compelling interest of preventing minors from being exposed to indecent telephone messages.

In later cases in the lower courts, the FCC's technological approach has been upheld; there has been no claim that parental presence alone is a sufficient means of protecting children from indecent material.[8]

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[8] *Dial Information Services Corp.* v. *Barr*, 938 F.2d 1535 (2d Cir. 1991), cert. denied, No. 91-967 (Jan. 27, 1992); *Information Providers' Coalition for Defense of the First Amendment* v. *FCC*, 928 F.2d 866 (9th Cir. 1991).

As the FCC explained in detail (Pet. App. 131à-140a), no comparable technology is available to deny children access to indecent material broadcast over the public airwaves. The record establishes that more than "a few of the most enterprising and disobedient young people" can and do turn on their radios and televisions around the clock. Pet. App. 129a. The First Amendment does not require Congress or the courts to ignore those realities. The mere presence of an adult in a home is not the equivalent of effective control over the access of children to indecent broadcasting, and nothing in this Court's cases suggests otherwise.

Indecent broadcasting cannot be targeted exclusively at adults who wish to receive it. Consequently, before it struck down the statute at issue here, the court of appeals should have considered whether the compelling interests in the privacy of the home and the protection of children must be subordinated to the interests asserted by respondents in broadcasting indecent speech over the public airwaves into every home with a television or a radio. The court failed to do so. That question is ripe for further review, and worthy of this Court's attention.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JOHN G. ROBERTS, JR.
*Acting Solicitor General**

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* The Solicitor General is disqualified in this case.